

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOHN HENRY DAVIS,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

Case No. C05-1741-RSM-JPD

REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner has filed a 28 U.S.C. § 2254 petition for writ of habeas corpus and a motion for appointment of counsel. Respondent has filed responses opposing both the petition and motion. Dkt. Nos. 13, 19. Following a careful review of the pleadings and record, the Court recommends that petitioner's § 2254 petition, (Dkt. Nos. 1, 6), be dismissed because he has failed to adequately exhaust his state court remedies. The motion for appointment of counsel, (Dkt. Nos. 16, 18), should be denied as moot.

II. FACTS AND PROCEDURAL HISTORY

The facts and procedural history for this matter are brief. On September 2, 2005, petitioner was convicted in King County Superior Court on two counts of violating Washington's Uniform Controlled Substances Act. Dkt. No. 15, Ex. 1. He was sentenced to thirty months on count one and eighteen months on count two, with the sentences to run concurrently. *Id.* Petitioner is presently serving his sentence at the Stafford Creek Corrections Center in Aberdeen, Washington.

01 On September 12, 2005, petitioner submitted to Division One of the Washington  
02 Court of Appeals (the "Court of Appeals") a motion that it construed as a personal restraint  
03 petition ("PRP"). Dkt. No. 15, Ex. 3. On November 17, 2005, the Court of Appeals  
04 dismissed the PRP for failure to pay the required filing fee or provide a statement of his  
05 finances. Dkt. No. 15, Ex. 4. Acting through counsel, petitioner filed a notice of direct  
06 appeal in the Court of Appeals. Dkt. No. 15, Ex. 2. That appeal is still pending. Dkt. No. 1.

07 On October 14, 2005, petitioner filed the present 28 U.S.C. § 2254 petition for writ of  
08 habeas corpus. In it, petitioner challenges the validity of his plea and argues that the  
09 sentencing judge erroneously applied the sentencing guidelines.

### 10 III. DISCUSSION


11 This petition should be dismissed without prejudice because petitioner has failed to  
12 properly exhaust his state court remedies. In order for a federal district court to review the  
13 merits of a § 2254 petition, the petitioner must first exhaust his state court remedies. 28  
14 U.S.C. § 2254(b)(1)(A); *Fields v. Waddington*, 401 F.3d 1018, 1020 (9th Cir. 2005). A  
15 petitioner can satisfy the exhaustion requirement by either (1) fairly and fully presenting each  
16 of his federal claims to the state's highest court, or (2) demonstrating that no state remedies  
17 are available to him. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996) (internal citations  
18 omitted). Thus, "a would-be habeas corpus petitioner must await the outcome of his [state  
19 court] appeal before his state remedies are exhausted." *Sherwood v. Tomkins*, 716 F.2d 632,  
20 634 (9th Cir. 1983).

21 In this case, the record indicates that a direct appeal of petitioner's state court sentence  
22 is currently pending in the Court of Appeals. Dkt. Nos. 1, 6. Petitioner's state court remedies  
23 are therefore unexhausted. This petition should therefore be dismissed without prejudice.  
24 Additionally, petitioner's motion for appointment of counsel, (Dkt. Nos. 16, 18), should be  
25 denied because it is moot. A proposed order accompanies this Report and Recommendation.

IV. CONCLUSION

For the reasons discussed above, the Court recommends dismissing this § 2254 without prejudice because petitioner has not exhausted his state court remedies. His motion for appointment of counsel should be denied as moot. A proposed order accompanies this Report and Recommendation.

DATED this 24th day of February, 2006.

  
JAMES P. DONOHUE  
United States Magistrate Judge